NO. 81-19

Office-Supreme Court, U.S.
FILED
JUL 2 1981
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA

-vs-

CARROLL LEPPO,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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P. O. BOX 363
CRANBURY, N.J. 08512
AREA CODE 609
443-4202

QUESTIONS PRESENTED FOR REVIEW

I. In a criminal prosecution, can Federal jurisdiction exist under the Hobbs Act in the absence of some actual effect on interstate commerce?

II. Does the Fifth Amendment of the U.S. Constitution:

A. Permit an FBI agent in a Federal prosecution to testify in the presence of the jury that a Defendant exercised his right to silence during interrogation and escape the sanctions of prosecutorial overreach?

B. Permit a U.S. Attorney to argue that the Defendant's silence in the face of accusation is to be considered by the jury as evidence of guilt?

PARTIES INVOLVED

The parties involved in the proceeding in the Court below were the United States of America and Carroll Leppo.

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REFERENCE TO OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit, dated April 2, 1981, docketed at No: 80 2528, is reproduced in the appendix at Page 1a The Order denying Leppo's Petition for Rehearing is reproduced in the Appendix at Page 3a . The Order of the United States District Court of the Middle of Pennsylvania denying the Motion of Carroll Leppo for a new trial and in arrest of judgment is reproduced in the appendix at Page 4a .

JURISDICTION

This Petition seeks review of the Judgment Order of the United States Court of Appeals for the Third Circuit, dated April 2, 1981, docketed at No: 80 2528, affirming the conviction and judgment sentence of the United States District Court for the Middle District of Pennsylvania. Additionally, by Order dated May 5, 1981, the United States Court of Appeals for the Third Circuit denied Petitioner's Petition for Rehearing. Jurisdiction is conferred in this Honorable Court by **28 U.S.C. §1254 (1)**, and **Rule 17** of the Rules of this Honorable Court. The United States District Court for the Middle District of Pennsylvania assumed jurisdiction based on alleged violations of federal criminal law, specifically, **18 U.S.C. §1951**, alleged to have been committed within the jurisdiction of the Middle District of Pennsylvania.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. §1951:

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by

robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisioned not more than twenty years, or both.

(b) As used in this section---

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce

within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State thruogh any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Petitioner, Carroll Leppo, was indicted by a grand jury sitting in Harrisburg, Pennsylvania, on March 28, 1980, on two indictments charging violation of the Hobbs Act 18 U.S.C.§1951 and was arraigned on April 14, 1980. The Defendant, Leppo, was named in Counts I an II of four counts in one indictment and multiple counts in the second.

Counts I and II were severed from Counts III and IV on request of Leppo, and trial commenced on these two counts on June 16, 1980, after the government had rested its case a mistrial was granted based on a at trial violation of Defendant's Fifth Amendment Rights. A new trial was scheduled to begin September 2, 1980, after trial of co-Defendants in the first indictment and trial on the second indictment. The Defendand was acquitted of all charges by a jury on the second indictment. A Motion to dismiss the first indictment on the grounds of prosecutorial

overreach and thus, double jeopardy was filed, refused by the District Court, appealed to the Third Circuit Court of Appeals and still pending when the second trial took place September 2 - 3 and September 8 - 9, 1980. The jury acquitted Leppo on Count I which dealt with his receipt of a political campaign payment in September of 1975 and was convicted on Count II which was based on receipt by Leppo of $300.00 in February, 1976. Leppo timely filed post-trial motions which the District Court denied on November 4, 1980. Leppo was sentenced by Order dated September 29, 1980. Leppo appealed to the Third Circuit from that sentence and verdict. By Order dated April 2, 1981, the Third Circuit affirmed the judgment of the District Court. Leppo timely filed a Petition of Rehearing in the Third Circuit, which Petition was denied by that court on May 5, 1981. The Petition for Writ of Certiorari followed.

In the meantime, on March 5, 1981, the Third Circuit affirmed the District Court's denial of Leppo's pre-trial motion to dismiss on double jeopardy.

II. FACTUAL HISTORY

As set forth above, Leppo was indicted on two counts of **Hobbs Act** violations. Count I alleged that Leppo had received a campaign contribution of $500.00 in September, 1975 from Charles Warner, who was interested in seeing Leppo and his running mate, Robert Bowers, elected as York County Commissioners. Count II of the indictment charge Leppo with violating the **Hobbs Act** by taking $300.00 payment from Warner on or about February 13, 1976. Leppo was acquitted on Count I and convicted on Count II at his second trial, the first trial having ended in a mistrial.

The facts, as they were established at trial, developed that Warner, the chief prosecution witness, worked for an architectural firm engaged in interstate commerce. Warner received pay in the nature of a salary as a division of partnership profits. From his personal funds, Warner paid Leppo the sum of $300.00. Thereafter, Warner sought and received reimbursement from a fund created from his and his partners' personal funds for political purposes. The testimony at trial was that the payment by

Warner was made on a personal friendship basis.

Before the first trial, Leppo filed a Motion to Suppress Statements allegedly made by him. As a result, a suppression hearing was held in advance of the first trial, on June 16, 1980. At that hearing a government witness, Frank Cryan, an FBI agent, testified that after submitting to a polygraph examination, Leppo made certain inculpatory statements about the political contributions. At that time, Cryan posed additional questions to Leppo who refused to answer the questions, invoking his Fifth Amendment rights. That testimony was elicited by the prosecutor.

At the first trial, during direct examination by the prosecutor, Cryan indicated that, at a certain point in the conversation, Leppo indicated that he wished to answer no further questions. Leppo's counsel immediately made a Motion for Mistrial, which the District Court took under advisement. After the government rested, Leppo's counsel made a Motion for Judgment of Acquittal, which was denied. However, the District Court ordered a mistrial based on Cryan's statement. The District Court then scheduled a

retrial, to begin on September 2, 1980. At that trial, during his closing remarks to the jury, the prosecutor made a reference to the jury about Leppo's silence in the face of accusation with regard to the $300.00 alleged to have been paid to him in Count II of the indictment. After Mistrial Motion was refused, Leppo was acquitted of Count I and convicted of Count II.

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

The Supreme Court should grant the within Petition because the questions presented in this case involve important issues of federal statutory and constitutional interpretation. Moreover, the question of how far federal jurisdiction extends under the **Hobbs Act** has been dealt with inconsistently by different circuits and require that this Honorable Court rule on the extent of interference with interstate commerce required under the **Hobbs Act** in establishing the interstate commerce nexus.

This Court has held that the **Hobbs Act**, the federal government has jurisdiction of cases only on a factual interference with interstate commerce. **Stirone v. United States, 361 U.S. 212 (1960).** However, the circuit courts seem to be unanimous in holding that a minimal depletion or diminishing of resources of an interstate business is sufficient to establish jurisdiction. See **U.S. v. Mazzei, 521 F 2d 639 (3d Cir. 1975).** Prior to the

decision in the present case, the Third Circuit had extended the interstate commerce nexus to include situations where payment made by interstate lessors was a sufficient tie to interstate commerce, in that those payments reduced the lessors' capacity to make business purchases in interstate commerce. **United States v. Cerilli, 603 F 2nd 415 (3d Cir. 1979).**

However, in the present case, there was no evidence of any dimunition of depletion of resources of any business. On the contrary, Charles Warner, the government's chief witness and the individual who made the payment to Leppo, clearly and directly testified on several occasions during his testimony that the $300.00 payment in February of 1976 was made with personal after-tax dollars and had absolutely no effect on the business in which he was involved. Appendix in the Third Circuit(App. at 21a, 27a-29a.)

Moreover, two of Warner's partners in the architectural firm who testified at the trial, also confirmed that the money paid to Leppo had no effect on the purchasing power of the business in

interstate commerce. See testimony of Vernon Shields, App. at 30a-31a, 33a-41a. See also, testimony of Donald Williams, App. at 41a-44a.

The decision of the Third Circuit in the present case has the effect of extending federal jurisdiction under the **Hobbs Act** to cover any situation where money is paid from whatever source, so long as at some point the money has been income or generated by a business engaged in interstate commerce.[1] The Third Circuit has by its holding, overextended the jurisdictional limits of the **Hobbs Act** The decision in the present case, which consisted merely of a judgment order with no supporting opinion, is at odds with decisions in other Circuits, which were supported by full opinions.

---

1. In fact, the trial court so stated in its charge to the jury, when it said:

> You may find that interstate commerce was adversely affected if you find beyond a reasonable doubt that . . . the payments by Mr. Warner to Mr. Leppo were made and were from money contributed by the partners from money they received from the firm and were made on behalf of the firm,
> (cont'd)

As stated in **United States v. French, 628 F 2nd 1069 (8th Cir. 1980),** the Eighth Circuit stated:

> For reversal the government argues that the **Hobbs Act** prohibits all extortion affecting commerce not just extortion which has an "adverse" effect. We have some difficulty with this theory. Although the **Hobbs Act** on its face prohibits all extortion which "in any way or degree . . . affects commerce," the legislative history of the Act strongly indicates that Congress intended to protect the free flow of commerce and prevent exaction of any unlawful tribute from interstate commerce, and indicates no Congressional intent whatsoever to punish activity absent some adverse effect on interstate commerce. (Citations omitted.) Moreover, the government's theory seems to suggest that a robbery or extortion automatically would affect commerce as long as the victim engages in transactions involving articles which have been in interstate commerce. Courts have found such an effect where the evidence shows sudden depletion of resources which the victim would otherwise have used in transactions involving articles which had been in interstate commerce, or even in some cases

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(cont'd)
thereby depleting the firm's assets or reducing its profits. (Emphasis supplied.) App. at 45a-47a.

where the evidence showed only a possiblity that the money taken would have been in such transactions. The government's theory in this case would base federal jurisdiction upon a more tenuous nexus with interstate commerce, as there was no testimony that, absent the extortion, Torrey would have spent less or more money on the articles that which he regularly purchased from interstate commerce, or that failure to pay appellee off would threaten any consequences which would result in an increase or decrease in commerce. The government's theory would, therefore, extend the **Hobbs Act** coverage to any money taken by robbery or extortion from anyone who engaged in transactions involving goods which had been in interstate commerce, a reading of the **Hobbs Act** which in practicality would extend federal jurisdiction over just about any robbery or extortion. Such an assumption by the federal government of general jurisdiction over common law crimes traditionally covered by local law is something we would not lightly imply.

" See, e.g., **United States v. Cerilli, 603 F2d 415 (Third Cir. 1979), Cert. denied, 444 U.S. 1043, 100 S. Ct. 728, 62 L. Ed. 2d 728 (1980); United States v. Staszcuk, 517 F 2d 53 (Seventh Cir.) (en banc), cert. denied, 423 U.S. 837, 96 S. Ct. 65, 46 L. Ed. 2d 56 (1975).** But see **Comment, 66J. Crim. L. and Criminology 306, 318-20 (1975)** (arguing that

> because the **Hobbs Act** contains no legislative finding that extortion affects interstate commerce, effect upon commerce must be proven in every case and a potential effect would not be adequate to support invoking the **Hobbs Act**). See also **Comment, 1972 U. Ill. L. F. 805."** (Footnotes 6,7 and 9 omitted.) (Emphasis supplied.) 628 F2d at 1076-77.

See also **U.S. v. Craig, 573 F2d 513 (7th Circuit, 1978); U.S. v. Staszcuk, 502 F2d 875 (7th Circuit, 1974).** As stated in **Staszcuk:**

> "When the effect never materializes - despite the failure or success of the extortion - the commerce element of the **Hobbs Act** is not established." 10
>
> "10...if the extortion is successful and there is still no effect on commerce, the extortioner has not violated the **Hobbs Act.**" 502 F2d at 879.

The exact situtation existing in **French** and **Staszcuk** exists in the present case. The record is clear that the money paid to Leppo was paid out of private funds of a partner and his wife and thereafter, reimbursed to them out of private funds of the partners, which had already been distributed out of the partnership. That money having been distributed as profits from the partnership would never have been used for the

business. App at 21a. Once the funds were distributed, they were private funds of each individual and were no different and can be treated no differently then salary paid to an employee. The partnership, as a business entity, had no further claim upon or use of the profits paid to the partners.

Therefore, the issue before the Third Circuit, which it, by issuing a simple judgment order, failed to address, was the question of federal jurisdiction over the events which transpired in the present case. The evidence before the District Court and the Third Circuit on appeal, was insufficient to show a proper jurisdictional nexus between the money paid to Leppo and the business engaged in interstate commerce. This is an issue of significant importance in federal law, which should be addressed by this Honorable Court, particularly because of the increasing popularity of prosecuting public officials under the **Hobbs Act.**

Contrary to the holding by the Eighth Circuit in **U.S. v. French, supra,** the Third Cir-

cuit's affirmation of Leppo's conviction is an acknowledgment by the Third Circuit that the government no longer needs to prove that the money paid affected interstate commerce. Rather, in **Hobbs Act** prosecutions in the Third Circuit, the government now need only prove that money paid had at some point in the past belonged to or been used by a company engaged in transactions involving goods which had been in interstate commerce. The Third Circuit's tacit approval of that extension of the **Hobbs Act**, by its affirmation of Leppo's conviction, has extended the **Hobbs Act** jurisdiction to any robbery or extortion, an extreme to which the Court in **French** declined to permit. Such a result cannot be supported by the statutory and case law under the **Hobbs Act**. Therefore, it is appropriate that this Honorable Court consider the present case both to settle the apparent conflicting views of the Circuits as to what constitutes a deminimus effect on interstate commerce and to definitively establish the jurisdictional limitations to **Hobbs Act** prosecutions.

II. THE SUPREME COURT SHOULD CLEARLY PROSCRIBE PROSECUTORIAL CONDUCT IN FEDERAL CRIMINAL JURY TRIALS.

Leppo had been charged with and tried on two alleged extortionate transactions, the first occurring in September, 1975, involving a $500.00 contribution to his campaign and the second occurring in February, 1976, involving a $300.00 transfer. At the conclusion of a consentual polygraph examination, the FBI agent administering the examinatin inquired of Leppo concerning the September transfer of $500.00, to which Leppo made certain admissions. The agent made no inquiry concerning the February, 1976 transfer. In any event, Leppo specifically invoked his Fifth Amendment privilege and declined to answer any other specifics concerning the transfer of money. At Leppo's original trial, Cryan referred to Leppo's refusal to respond to questions concerning transfers of other monies and the Court granted a mistrial. On retrial, in his closing argument, the prosecutor made the following argument to the jury:

> And now, what about, again, the various facts regarding this

> February transaction? Well, first of all, again, Agent Cryan's testimony, Mr. Leppo didn't even talk about this $300.00 when he was talking about improprieties, not illegalities. It's this, but it's not that. He was talking about campaign money. He was talking about September. He never even said anything to Mr. Cryan about February and his vacation. App. at 44a.

This reference by the prosecutor was error in that it constituted an impermissible reference to Leppo's right to remain silent guaranteed by by the Fifth Amendment of the Constitution of the United States. Reference to the silence of the accused in the face of accusation, is an issue requiring clarification by this Court since other decisional law has consistently held such references by prosecutors to be error. **Malloy v. Hogan, 378 U.S. 1 (1964); Miranda v. Arizona, 384 U.S. 436 (1966).** See also **U.S. v. Hale, 422 U.S. 171 (1975); Doyle v. Ohio, 426 U.S. 610 (1976).**

The sole purpose of the prosecutor's reference to the jury of Leppo's failure to discuss the February transaction for which Leppo was

ultimately convicted, was to convey to the jury the inference that Leppo refused to discuss this incident with the FBI because of knowledge of his guilt. That reference is particularly inexcusable in light of the history of this case, where a mistrial was declared in the first trial for a statement very similar to that made by the prosecutor in this case.

This Court must make federal prosecutors clearly and acutely aware that if they violate a defendant's Fifth Amendment right, they do so at their own peril. In the present case, the prosecutor's remarks drew from facts not of record in the present case. The total record, including those parts which the jury was not a part of, such as the suppression hearing, the side bar conferences, and transcripts of the interrogation sessions submitted to counsel, clearly reflect that Leppo was never asked by the FBI about the transfer of money in February. Therefore, the prosecutor, by holding his reference to that incident until he closed to the jury clearly intended to influence the jury by making reference to something which was not in evidence. The

prosecutor was asking the jury to assume guilt by Leppo's failure to discuss the matter with the FBI agent when, in fact, the prosecutor knew full well that other reasons existed for Leppo's failure to bring the matter up at the interrogation following the polygraph examination. See **A.B.A. Standards Relating to the Prosecution Function and the Defense Function, §5.9** adopted by the Third Circuit in **United States v. LeFever, 483 F2d 477 (3d Cir. 1973).** Sections 5.8(a) and 5.9 state:

> 5.8 Argument to the jury.
> (a) the prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to mistate the evidence or mislead the jury as to inferences it may draw.
> 5.9 Facts outside the record.
> It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of fact outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experiences or matters of which the Court may take judicial notice. (Emphasis supplied)

The issue of prosecutorial misconduct is an important one, which this Court has addressed in

the past. However, both the District Court and the Third Circuit in the present case, ignored the admonitions of this Court and, to the extent that this issue appears to be unclear, this Court should rule on the matter so that the type of misconduct evident in the present case will not reoccur.

Finally, it is necessary that this Court rule on the issue of the admissibility of statements elicited from a defendant during the stages of a polygraph examination. The statements made by Leppo which were used against him at his trial, were made during the third phase of the polygraph examination, when Leppo was confronted with what was termed to be a deceptive response during his test. At that time, Leppo was discussing with the FBI agent his understanding of the impropriety of his conduct, which caused his physical reaction monitored by the polygraph instrument. However, because the statement was made during the polygraph examination, the defense was precluded from fully cross examining the FBI agent and from attempting to put the alleged statements in the proper context. The

effect of permitting testimony of the alleged admissions of Leppo was that the jury was left with the clear implication that Leppo failed to discuss the February incident out of a consciousness of guilt, rather than because he had not been asked about it and because he had invoked his Fifth Amendment rights at two specific times and places during the polygraph examination. This Court is urged to rule on the admissibility of statements made during a polygraph examination considering the general rule against admission of polygraph evidence.

The admissibility of evidence elicited at a polygraph examination and the prosecutor's comment on it is an important issue focusing on fundamental rights of criminal defendants and appears to be a question of first impression before this Court.

CONCLUSION

For all of the reasons set forth above, Petitioner, Carroll Leppo, respectfully requests this Honorable Court to grant a Writ of Certiorari and to hear the important issues presented.

Respectfully submitted,

SHOEMAKER, THOMPSON & NESS

BY: s/D.W.S.
DANIEL W. SHOEMAKER, ESQUIRE

Attorney for Petitioner, Carroll Leppo

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 80-2528

UNITED STATES OF AMERICA

v.

CARROLL LEPPO,

Appellant

Appeal from the United States District Court
for the Middle District of Pennsylvania
Crim. No. 80-00034-01

Argued March 26, 1981

Before: ADAMS and GARTH, Circuit Judges, and
FISHER, District Judge*

JUDGMENT ORDER

After considering the contentions raised by appellant, namely, that the lower court erred (1) in denying his motion for judgment of acquittal, and the verdict was against the weight of the evidence, because the government failed to prove any effect on interstate commerce by the payment

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* Honorable Clarkson S. Fisher, Chief Judge, United States District Court for the District of New Jersey, sitting by designation.

of money to appellant; (2) in failing to grant a mistrial based on the remarks made by the prosecutor in his closing statement; (3) in failing to suppress a statement made by him at a post-polygraph examination; (4) in failing to grant his motion for judgment of acquittal, because there was insufficient evidence to support a finding of extortion; (5) in failing to grant his pretrial motions to dismiss based on double jeopardy; and (6) in making numerous procedural and evidentiary errors both before and during trial which individually and cumulatively created prejudicial error, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT:

Adams
Circuit Judge

ATTEST:

s/S.M.
Sally Mrvos, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2528

UNITED STATES OF AMERICA

v.

CARROLL LEPPO,

Appellant

SUR PETITION FOR REHEARING
EN BANC

Present: Seitz, Chief Judge, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, Circuit Judges.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

DATED: May 5, 1981

Adams
Circuit Judge

APPENDIX C

LOWER COURT'S OPINION DENYING DEFENDANT'S MOTION FOR A NEW TRIAL AND IN ARREST OF JUDGMENT FILLED NOVEMBER 4, 1980 .

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : Criminal No. 80-00034-1

V. : (Judge Muir)

CARROLL LEPPO :

OPINION

MUIR, District Judge

On September 9, 1980, a jury returned a verdict finding the Defendant guilty of one count of a two-count indictment charging extortion in violation of the Hobbs Act, 18 U.S.C.A. §1951. On September 15, 1980, the Defendant filed motions for a new trial and in arrest of judgment pursuant to Fed.R.Crim.P. 33 and 34. A brief in support of the motion was filed on September 29, 1980 and the Government filed a brief in opposition to the motions on October 10, 1980. For the reasons that follow, the motions will be denied.

Succinctly stated, Leppo was convicted of extorting $300.00 from the architectural firm of Williams, Shields, Snyder & Goas in February 1976

at which time Leppo was a county commissioner and the firm had a contract with York County, Pennsylvania, to propose plans to rehabilitate or replace the York County Prison. Leppo raises 13 grounds in support of his motions, each of which will be discussed separately.

Leppo argues that there was no evidence from which the jury could find beyond a reasonable doubt that interstate commerce was affected or that the money was obtained under color of official right or by the wrongful use of fear of financial injury. While it is true that neither Charles Warner nor his partners specifically testified that they acted under duress and Warner testified that he believed that the money was paid on the basis of friendship, there was other evidence from which the jury could conclude beyond a reasonable doubt that Leppo in fact extorted the money. Warner and his partners testified that a factor in their determination whether to make the payment was Leppo's position as county commissioner and the architectural firm's relationship to the county commissioners under the

contract. In addition, Warner throught it necessary to discuss Leppo's request for money with his partners. Further, Warner was approached by Leppo for the money while they were alone in Leppo's office very shortly after the contract was let to the architects. From these facts, the jury could have concluded beyond a reasonable doubt that Leppo extorted the money under color of official right or by the wrongful use of fear of financial injury.

Insofar as the nexus to interstate commerce is concerned, there was ample evidence of that as well. Leppo makes much of the fact that the money paid to him was contributed to Warner by his partners after partnership profits had been distributed. If Leppo had been given a check drawn on the partnership account, there would be no question that the payment of that money by the architectural firm, which was engaged in business in states other than Pennsylvania and which purchased goods in interstate commerce, would have resulted in a diminution of the firm's profits or in an increase in the cost of doing

business, thereby constituting an effect on interstate commerce. See United States vs. Provenzano 334 F.2d 678, 693 (3d Cir.); cert. denied, 379 U.S. 947 (1964).

The fact that the money took a less direct route does not alter the analysis. There was testimony that the architects believed that it was illegal for the firm to make a direct contribution and for that reason the fund from which the payment was made was created by after-tax dollars. There is no question that the money was paid by members of the firm with the intent to further the firm's business interests. This was not a case where an individual made a payment of money, the ultimate source of which may have had some impact on interstate commerce. Rather, this case involved the payment of money on behalf of a firm engaged in interstate commerce by members of that firm for the purpose of avoiding adverse consequences to the firm. Consequently, the Government proved the required nexus to interstate commerce.

Leppo renews his argument that the Court

should have suppressed testimony relating to statements made by Leppo following a polygraph examination of the Defendant. This matter was thoroughly argued and briefed before trial. At no time did the Government attempt to admit the results of the polygraph examination or even to characterize the examination to the jury as a polygraph examination. The Court concludes now as it did then that the Government did not agree that statements by Mr. Leppo in connection with the polygraph examination would not be introduced into evidence, that the statements were not obtained in violation of Mr. Leppo's Fifth Amendment rights and that the fact that the statements were made in connection with the polygraph examination did not render them inadmissible.

Leppo renews his argument, rejected in the Court's order of August 14, 1980, that his retrial following a mistrial constituted double jeopardy. The Court adheres to the reasoning and result set forth in its order of August 14, 1980 and concludes that Leppo's retrial did not constitute double jeopardy.

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Leppo argues that the Court erred in admitting testimony of conversations between Charles Warner and his partner. The Court, in ruling on Leppo's contemporaneous objections, admitted only hearsay statements that were admissible under Fed.R.Evid. 803(3) as showing the declarant's state of mind. Despite Leppo's arguments to the contrary, each partner's state of mind was relevant because the crime charged required that the victims part with money either under color of official right or because of fear of financial injury. In order to meet its burden of proof, the Government could properly show the state of mind of each victim of the alleged extortion in an attempt to prove that the victims paid the money because of Leppo's office or because they feared financial injury if they did not pay. It was for the jury to conclude based on the other evidence in the case whether Leppo induced those fears and whether the victims' reactions to the circumstances were reasonable. There was, therefore, no error in admitting the hearsay statements.

Leppo argues that the Court erred in pre-

venting his counsel from asking certain hypothetical questions of Warner and his partners. Specifically, counsel sought to learn what the witnesses' reactions would have been if they believed that they were being "shaken down." The government's objection to questions along this line was properly sustained because they called for the witnesses to speculate as to what their actions would have been had certain events taken place. Testimony of that kind had no probative value because the issue in dispute was that the witnesses' reactions were to the facts as they existed. Leppo explored in depth those reactions and the Court's refusal to permit the hypothetical questions was not erroneous.

Leppo also claims that the Court committed an error requiring a new trial when it limited his cross-examination of a witness with respect to Government exhibit 5.20, which was a multi-paged document showing campaign contributions to the York County Democratic Committee. On direct examination of Maureen Chambers, the Government directed questions relating to the

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first three pages of the report. On cross-examination, Leppo's counsel attemped to delve into the fourth page of the report. The objection to this line of questioning was sustained because it went beyond the scope of direct examination. **Lis vs. Robert Packer Hospital, 579 F.2d 819 (3d Cir. 1978), cert. denied, 99 S.Ct. 354.**

The Court is aware of no rule of evidence that requires the admission of every page of the multi-page document. The Government's questions were limited to certain aspects of the document and the attempted cross-examination went beyond those issues into other matters. The Court's ruling did not prevent Leppo from recalling Ms. Chambers as his witness if he thought she had information favorable to his case. Instead, counsel chose to limit Leppo's defense to the testimony of character witnesses. The Court finds no error in its evidentiary ruling.

Leppo also contends that an error was committed by permitting Mr. Shields, a partner in the architectural firm, to testify about materials used in the construction of the York County

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Prison that were purchased from sources outside of Pennsylvania. In light of the theory of interstate commerce presented to the jury, this evidence was irrelevant. Its admission, however, was not prejudicial to Leppo and did not confuse the jury in any way. During its closing, the Government did not refer to this testimony and its admission, if error, was harmless.

Leppo also claims that the Court erred by permitting testimony that showed Leppo violated a Pennsylvania law requiring that he report campaign contributions. The Court admitted this evidence because it determined that its probative value in relation to issures other than propensity to commit crimes outweighed any prejudicial effect of the testimony. See United States vs. Trotter, 529 F.2d 806, 813 (3d Cir. 1976). The evidence was probative because it tended to show Leppo's state of mind as to the receipt of the September 1975 contribution. The prejudicial impact was slight in that the reporting law was a technical matter, involved no social stigma and was not emphasized by the Government. A strong indica-

tion that the testimony was not prejudicial is that Mr. Leppo was acquitted of Count I of the indictment which involved the alleged receipt of money prior to the 1976 election. This was the money the Government contended was not properly reported. The Court is unwilling to assume that the testimony about the Pennsylvania reporting law tainted the jury's deliberations with respect to Count II, which did not relate to those laws. Consequently, the admission of the evidence does not require a new trial.

Leppo contends that the Court erred in permitting the Government to ask leading questions of Donald G. Williams, one of Warner's partners. The questioning of Williams by the Government relating to crucial conversations between Williams and Warner was not leading. The Court sustained several of counsel's objections to leading questions and the Government proceeded with the examination without the use of such questions. Consequently, the Government's method of examination of Williams is not grounds for a new trial.

Leppo next contends that remarks by

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Government counsel in closing called attention to Mr. Leppo's exercise of his Fifth Amendment rights and require a new trial. Leppo must, in addition to showing that the remarks were improper demonstrate that the improprieties were such that they probably resulted in prejudice to him and that the prejudice had not been neutralized by the Court's instructions to the jury. United States vs. Homer, 545 F.2d 864, 868 (3d Cir. 1976)(per curiam), cert. denied, 431 U.S. 954 (1977). Leppo has failed to meet this burden.

The prosecutor's comments related to a conversation Leppo held with F.B.I. agent Cryan following a polygraph examination. Of course, the jury was not informed that the conversation related to a polygraph examination. The Government noted that the discussion between Cryan and Leppo related only to the first alleged payment, that of September 1975, and nothing was said as to the February 1976 payment, for which Leppo was convicted. The Government's comments were not prejudicial in light of the fact that in his opening statement, Leppo's counsel stated that

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Leppo had told Cryan that Leppo had received money from Warner on several occasions and that such conduct was improper but not illegal. Moreover, the Government's argument was in the context of marshalling the evidence relating to each of the separate counts of the indictment. The Court instructed the jury concerning Leppo's right to remain silent and charged the jury they could draw no inferences from the exercise of that right. Based on all the circumstances of the case, including other evidence of Leppo's guilt, the Court concludes that a new trial is not warranted.

Leppo also assigns as an error the Court's order of June 5, 1980, 10 days prior to the first trial of this matter, permitting the Government to amend its bill of particulars to state that Leppo received money from Warner on or about February 13, 1976 rather than on February 13, 1976. The amendment was allowed after Leppo served on the government a notice of alibi for February 13, 1976. The amendment to the bill of particulars did not prejudice Leppo. He had notice of it 90

days before the start of the second trial and counsel conceded in his opening that Leppo received two payments from Warner, thereby diluting the effect of the alibi. Consequently, the order permitting the Government to amend its bill of particulars is not grounds for a new trial.

Leppo next contends that the Court erred in granting the Government's points for charge and denying the Defendants' points for charge. Although Mr. Leppo submitted proposed points for charge during the first trial, he did not do so during the second trial. Leppo has cited no authority in support of his proposition that the points submitted during the first trial had continued vitality in the second trial. In Roberson vs United States, 249 F.2d 737, 743 (5th Cir 1957) cert. denied, 356 U.S. 919 (1958), the Court of Appeals for the Fifth Circuit held that the Defendant must resubmit new points for charge. Inasmuch as "[t]he identity of the offered instructions was not necessarily the same and the district attorney should not be expected to assume that they would be nor to search for copies of

them." The Fifth Circuit's observations apply with more force to the burden placed on the district court by counsel's tactics in this case.

In addition, prior to closings Mr. Leppo's counsel was asked by the Court whether he intended to submit points for charge and he replied that he did not. After the Court ruled on the Government's points, Leppo's counsel did not request rulings on his. Leppo has not stated how he was prejudiced by the court's failure to rule on his points, nor does he state which of the Government's points were erroneous. Moreover, Mr. Leppo did not object to the Court's failure to give his points for charge before the jury had retired and pursuant to Fed.R.Crim.P. 30 he may not assign the Court's failure to give his points as error.

Leppo also argues that error was committed when the Court corrected an erroneous statement counsel made to the jury. In his opening remarks, Leppo's counsel impugned the integrity of the jury by stating that they had given an incorrect answer when they stated during voir dire

that none had heard of other extortion cases involving political figures. As evidence of such knowledge, counsel referred to the then recent conviction of Representative Myers in an ABSCAM prosecution. Inasmuch as Congressman Myers was convicted of bribery and not extortion, the Court felt that the unfair attack on the jury should be corrected and did so. If the jury was prejudiced against the Defendant as a result of this encounter, a proposition the Court does not subscribe to, prejudice occurred when Leppo's counsel improperly insinuated that the jury either deliberately or accidentally gave false answers to a voir dire question. The Court's action in correcting counsel's misstatement was not prejudicial or improper.

Leppo's final contention is that the Court erred in sending to the jury copies of exhibits that were redacted to eliminate those portions of the exhibits that were not read in court. At the beginning of the first trial and again at the beginning of the second trial, the Court informed counsel that only portions of exhibits actually

read during trial would be sent to the jury. This was done to prevent potentially prejudicial material from being considered by the jury. This procedure protects both parties and saves the jury from wading through large amounts of irrelevant and extraneous material. Such procedure, which was disclosed in advance to counsel, is not improper and did not prejudice Leppo.

Based on the foregoing, the Court concludes that Mr. Leppo's motions in arrest of judgment and for a new trial will be denied.

An appropriate order will be entered.

s/Muir

MUIR, U.S. District Judge

DATED: November 4, 1980

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LOWER COURT'S ORDER DENYING DEFENDANT'S MOTIONS IN ARREST OR JUDGMENT AND FOR A NEW TRIAL FILED NOVEMBER 4, 1980

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

VS. : Criminal No. 80-00034-1 (Judge Muir)

CARROLL LEPPO :

ORDER

Leppo's motion in arrest of judgment and for a new trial are denied.

s/Muir
MUIR, U.S. District Judge

DATED: November 4, 1980

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A To the best of my knowledge, it was created from this check listing.

Q And whose monies goes towards those checks?

A During that year it would have been, to the best of my recollection, from all my four partners.

Q And you indicated that there is no firm equivalent of that particular check book. Why, again, did you establish that or why was it established?

A Well, the partners gave me funds. I didn't have any place else to put them, and I put them in my checking account. The reason the partners gave me funds is because it was our understanding that it was illegal for corporations or partnerships to make political contributions in firm names. So consequently we did it by the partners taking their own personal after-tax dollars -- after they had paid the tax and everything on them -- withdrew money from their savings account or out of their checking accounts, or whatever cash they had available, and gave

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it to me at some irregular intervals. And I would deposit it in that checking account.

Q For whose benefit were these ads procured?

A For the people who the check was made to.

* * * *

be that you, as a partner, and each of your other partners, would receive, during a period of time, a given year -- tax year -- a payment which represented the profit earned by, hopefully profit, earned by your partnership?

A That's correct.

Q And, of course, all of the expenses would have been paid either by the partnership or through the corporation that subcontracted?

A That's correct.

Q Now, directing your attention specifically to this personal account that you maintained at the Hamilton -- the then National Central Bank in Harrisburg --

A Yes.

Q I gather that you had one such account

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in the same bank in York? That is, your personal, personal account?

A That's correct.

Q You apparently used, maybe your wife used, or whatever, for household things?

A That's correct.

Q Then you had this separate account for convenience in Harrisburg, out of the Harrisburg branch in the same bank, but a different account?

A That's correct.

Q Now, specifically, the money, the dollars, that went into that account, is it not a fact that all of those dollars were to your knowledge, at least, dollars which were paid not by the partnership, or by the corporation that you subcontracted to, but were paid by the individual partners with monies that were after taxed, after expenses, they were their salary or their division of net profits, isn't that a fact?

A That's exactly right, sir.

* * * *

Q Now, with regard to whatever sum of money, whether three of five hundred dollars,

given to Mr. Leppo in September, and $300 given to Mr. Leppo in February of 1976, and any other sum that you may have given to Mr. Leppo in the year 1975, in the primary, if you did, okay, with regard to whatever that total sum was, did that money, in any way, diminish the buying power of the partnership of your architectural form or its ancillary corporation?

A No.

Q So that you are saying that there was no effect by virtue of those contributions on the amount of commerce that your firm might have engaged in during that period of time?

MR. MARTIN: Your Honor, I will object. It's an ultimate question for the jury to decide and this witness is not in a position to answer that question.

MR. SHOEMAKER: I think, Your Honor, that that is specifically the very text of the issue and if the Government has profferred an indictment which indicates in its text that the transfer of funds did effect, obstruct, or delay Interstate Commerce and the movement of articles

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and commodities in commerce, I should be entitled to examine or cross examine how, if at all, that commerce might have been effected. And I am trying to eliminate one of the possibilities that has been suggested by virtue of certain questions and answers and documents that have previously been testified to by this witness and others.

THE COURT: What is your view on the objection about the ultimate issue?

MR. SHOEMAKER: I am not asking the witness to pass judgment on the ultimate issue of whether or not the Defendant is guilty or in-innocent, I am merely attempting to determine whether or not a specific area, a portion of the text of an indictment, in a particular area, qualifies for submission to constitute a portion of that which is required. I'm not asking the ultimate issue which is in the province of the jury and the finding of facts.

THE COURT: Rule 704 of the congressionally adopted Rules of Evidence, reads as follows: "Testimony in the form of an opinion or inference,

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otherwise admissible, is not objectionable because it enbraces an ultimate issue to be decided by the trier of the fact," and the Advisory Committee notes specifically says, "The so-called ultimate issue rule is specifically abolished by the instant rule," so we will overrule the objection.

You may answer the question.

BY MR. SHOEMAKER:

Q Do you recall the question?

A No, sir.

Q I wanted to know, and specifically asked, whether or not the payment of whatever funds you paid to Mr. Leppo in any way, with regard to your firm and its -- either the partnership or the corporation -- whether it in any way had any effect on the quantity or quality or the business that you did in Interstate Commerce.

A No.

* * * *

BY MR. SHOEMAKER:

Q Did, at any time, Mr. Leppo, in September of -- September 29, 1975, or thereabouts, did he ever attempt to use some sort of fear of financial injury to you in the transaction of that

exchange of money?

MR. MARTIN: Objection, Your Honor, for the same reasons. I think the question could be asked without reference to the fear of financial injury which is a legal phrase.

MR. SHOEMAKER: I don't understand the objection, Your Honor. I don't agree with it.

THE COURT: We'll overrule the objection. You may answer the question, if you can.

THE WITNESS: The question was --

THE COURT: Do you want it read back?

THE WITNESS: Please.

(Question read.)

THE WITNESS: No.

BY MR. SHOEMAKER:

Q Did he ever express to you any explanation or reason that he would have to demand from you such payment?

A No.

Q With respect to the February transaction, February whatever date, whether it was 12th, 13th, whatever, at that time did Mr. Leppo express to you some -- in some way -- some right

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that he had to solicit some help from you?

A No.

Q Did he, at that time, express to you some -- in some way -- some reason that you should have fear of financial injury at the time he made the request?

A No.

Q At the time of that last transaction, the contract that ultimately your firm did its work under, was in affect, had been signed and was in affect, is that right?

A. That last transaction you mean in February?

Q February, yes.

A Yes.

Q And after that time, the work that you did, was it, indeed, at all times competitive, and was it uninfluenced, to your knowledge, by whatever had theretofor transpired?

A Yes.

Q Was the fee a fair fee?

A I certainly think so.

MR SHOEMAKER: We have no further

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questions.

THE COURT: Do you have redirect?

MR. MARTIN: Yes, I do, Your Honor.

THE COURT: All right. Well, will it take more than a couple of minutes?

MR. MARTIN: I think it will, Your Honor.

THE COURT: All right. It's now 3:58. We will adjourn until Monday morning.

Thank you.

(At 3:58 P.M. the trial was adjourned until Monday, September 8, 1980, at 10:00 A.M.)

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BY MR. MARTIN:

Q Mr. Shields, from time to time, or -- what, if on any occasion, have you given Mr. Warner sums of money?

A For political contributions.

THE COURT: Counsel, are you now getting into a slightly new subject? We're past the recess time. I'd like you to pick a convenient place, or maybe you're about to finish.

MR. MARTIN: Just about, Your Honor.

THE COURT: All right.

BY MR. MARTIN:

Q And how do you contribute, if at all do you contribute to Mr. Warner in such requests?

A From my personal funds.

Q And where do your personal funds come from, Mr. Shields?

A Either from my salary from G&L Engineering or from my share of the profits in Williams, Shields, Snyder & Goas.

MR. MARTIN: No other questions of the Witness, Your Honor.

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THE COURT: All right. Do you wish to take a recess now?

MR. SHOEMAKER: At the Court's discretion. Mine may be a little while, so perhaps it would be appropriate.

THE COURT: All right. We'll take a 15 minute recess.

(A short recess.)

CROSS EXAMINATION

BY MR. SHOEMAKER:

Q Mr. Shields, how long have you been a partner in this firm?

A Since 1967.

Q And your job with the firm is what?

A Is overseeing the preparation of contract documents and specifications and reviewing and checking shop drawings.

Q You're not involved, I assume, in the public relations promotional end of it?

A No, I'm not.

Q You were not a participant in any of the promotions of the York County jail contract

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with the County Commissioners or the Jail Board or the Courts down there?

A No, I wasn't.

Q And I gather from that that you are not particularly motivated or, say, interested in that aspect of your firm's work?

A I'm interested but not too well qualified to do it.

Q I gather that you have a good deal of familiarity with the materials that went into the jail?

A That's correct.

Q And the subcontractors?

A Yes.

Q You dealt with them in the course of construction, checked the material and had certain approvals to make concerning the qualifications of those materials?

A That's correct.

Q Your job then allows you to know that indeed the materials came for this actual construction from all over the United States?

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A That's correct.

Q Mr. Shields, assume for the moment that despite you instructions to Mr. Warner concerning giving any money to Mr. Leppo, assume for the moment that he disobeyed your instructions and did give some money to Mr. Leppo from his personal account -- which I gather you may have contributed to at some time or another -- is that correct? You did contribute to it?

A For this --

Q No, you contributed to the personal account that Mr. Warner had available to him?

A Yes.

Q Assume for the moment that he took -- Mr. Warner took some money from that personal account and gave Mr. Leppo some money, okay?

A Yes.

Q Did that change anything in these lists of suppliers?

A Not that I know of.

Q Did it make any difference whatsoever as to the quanitities, the quality or the nature

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of the materials that went into the ultimate construction?

A No, it didn't.

Q You're telling me that it doesn't make any difference whether he did or didn't give money to Leppo from that personal account, it had no bearing on what the construction actually was?

A That's right.

Q Didn't diminish it or enlarge it?

A No.

Q Of course, the monies for these materials all came from the County, did they not?

A That's correct.

Q You don't know anything about the actual transactions that Mr. Warner had with Mr. Leppo, that is to say, you never personally participated in or had any personal knowledge of any of these transactions?

A No, I didn't.

Q You weren't present at any time when any of them took place, if they did?

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A No, I wasn't.

Q And I gather that except for the one inquiry, your weren't consulted about it?

A That's -- to the best of my knowledge, that's the only time I was consulted.

THE COURT: Sir, I couldn't hear that.

THE WITNESS: I said, to the best of my knowledge that was the only time I was consulted.

BY MR. SHOEMAKER:

Q You, apparently back in the '60's, '60's, '70's, sometime substantially before we reached the York County deal -- prison contract -- at some time the individual members of your firm had reached some understanding about political contributions, is that correct?

A Yes.

Q You and your partners knew that it was improper under the law as it was then in extistence, for a corporation or firm, a business, to directly make political contributions, is that correct?

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A Yes.

Q And so that your business would not be in any way involved -- that is, your achitectural firm or the corporation that handled some of the subcontracting for your firm -- so that neither of those businesses would be involved, each of the partners agreed to, from their personal funds from their after tax monies, to contribute to a fund so that you could promote by making political contributions, is that correct?

A Not quite correct. We didn't contribute to a fund. As a contribution was made we gave the money.

Q You gave the money to Warner so that Warner could make political contributions?

A That's correct.

Q Once you made the gift or transferred the money to Warner, as far as you're concerned, it was Warner's money to handle, not the firm's?

A No.

Q No?

A It was our money, each individual's

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money, not Warner's money.

Q Okay. It was each individual's money Now, when you say "each individual's money", you mean that it was not the corporation's money?

A That's correct.

Q It was not the architectural partnership's money?

A That's correct.

Q It was your personal money and your partners' personal money taken out of your personal pocket?

A That's correct.

Q Now, would this have been done after you paid your taxes on it?

A Yes.

Q Would it have been done after you paid all the expenses of your businesses?

A No, because it was our personal money. Business expenses were paid out of the business funds. This came out of our personal money.

Q So this would be after expenses? In

other words, the partnership had certain expenses as I understand it, from what Mr. Warner said, the partnership hired the corporation to hire personnel and pay, or supply the wiggets and typewriters and paper and do those mundane things that go into the business operations, right?

A That's correct.

Q And the partnership paid certain expenses but mostly they paid the corporation to pay the expenses?

A That's correct.

Q Okay. Now, you got a salary from the corporation?

A Yes.

Q And you got some profits, the split of profits --

A Correct.

Q ...from the partnership?

A That's correct.

Q And then you paid your taxes on that and put it in your -- figuratively -- put it in

your pocket?

A Correct.

Q That was your money to do with as you saw fit?

A That's correct.

Q Now, one of the things you saw fit to do was to contribute to this fund that Mr. Warner handled, is that right? You, personally, together with your other partners, you all saw fit to contribute to this bank account that Mr. Warner maintained which you eventually, or which he eventually made political contributions out of?

A Only as a political contribution came up, yes.

Q My inquiry was really this: assuming for the moment that a political contribution was made to Carroll Leppo, okay?

A Yes.

Q Apparently you can't say whether it was or wasn't, because you didn't do it or have anything to do with it, but assuming that one was back in 1975, or maybe several, from this

fund that we've been talking about, can you tell me if that diminished your corporation's ability to buy anything or do business?

A No.

Q Had no affect on it whatsoever, did it?

A No.

Q Would you tell me whether it diminished in any way your partnership's ability to buy things?

A No.

Q In other words, it had no direct relationship to either the partnership or the corporation as far as their financial resources?

A That's correct.

Q Are you telling me then, Mr. Shields, that assuming that Mr. Warner did give some money form this fund to Mr. Leppo, A, as a political contribution back in 1975, or B, as a loan, gift or whatever, in February of '76, that it had absolutely no affect on the operation of your corporate or partnership business?

A That's correct.

Q So then it did not diminish what you

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bought or sold in Interstate Commerce?

A Not to my knowledge.

Q And you also said that it had no affect -- if it happened -- it had no affect whatsoever on what was bought and transferred and the business in Interstate Commerce in the building of the jail?

A Not that I know of, no.

Q Mr. Shields, you apparently had some sort of conversation with Mr. Warner. I don't want you to repeat what Mr. Warner said, but you were asked about your, apparently, sort of your frame of mind, your attitude toward this transaction, whatever it was, and you expressed yourself negatively. You were disinclined to do something?

A That's correct.

Q Isn't it a fact, Mr. Shields, that if you had been concerned that it would affect your contract, you would have thought it over carefully and perhaps suggested...

Q These monies -- assuming that Charlie

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Warner did, in fact, give money in the campaign, to Carroll Leppo -- assuming for the moment that Charlie Warner did, in fact, take some money down to Carroll sometimes after the 10th when you had this contract signing -- and assuming those monies did indeed come from this bank account that I have loosely called the fund, Okay?

A Yes.

Q ...as opposed to Charlie Warner's personal pocket or otherwise. Did that have any effect on the amount of pencils or paper or things of any kind that your firm, either your partnership firm or your corporate firm, bought on the market?

A No.

Q Had no effect on that firm at all, did it?

A No.

Q So it didn't diminish your resources of the firm?

A No.

Q Either one, corporate or partnership?

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A No.

Q In other words, whatever money was involved was your own personal money. You can give it to the church or you can throw it away or you can go by lollipops or spend it at the fair or make a political contribution or make a loan or make a gift and it was your own personal money. It had nothing at all to do with the business per se, did it?

A No.

Q We have a document here that has been proffered in evidence which Mr. Shields testified describes all these various suppliers and subcontractors that -- all over the country -- that put materials and stuff into this prison, labor and so forth. I'd like you to tell this jury whether or not there was any effect whatever on the actual prison construction because Mr. Warner -- if he did, indeed -- give to Carroll Leppo, was there any change whatsoever in the nails and timbers and doors and glass and the things that went into that construction of the prison? Did

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that have any effect whatsoever on the construction of the prison?

A No.

Q None whatsoever?

A Not that I would know.

Q To your knowledge, none of your partners, as individuals, as opposed to your partnership or the partnership corporation, none of your partners are engaged in a business or their own, are they?

A Not that I know of.

* * * *

February, the next incident. Now, this was a golden opportunity for Mr. Warner, if he wanted to, to give a personal campaign, or -- excuse me -- it was not a compaign contribution. It was a golden opportunity, though, to help his friend, Carroll Leppo, with his own money, from his own checking account, apart from Williams, Shields, Snyder & Goas. It was his opportunity to give his friend $300. He didn't do it. Instead, he went back to the firm and got reim-

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bursed. The deposit slip shows that. The check shows that. The checking account shows that. The depth of his friendship for Mr. Leppo.

Now, what about, again, the various facts regarding this February transaction? Well, first of all, again, Agent Cryan's testimony, Mr. Leppo didn't even talk about this $300 when he was talking about improprieties, not illegalities. It's this, but it's not that. He was talking about campaign money. He was talking about September. He never even said anything to Mr. Cryan about February and his vacation.

MR. SHOEMAKER: Your Honor, I'd like to approach the bench on this.

(At sidebar.)

MR. SHOEMAKER: I move for a mistrial.

* * * *

You may find that interstate commerce was adversely affected if you find beyond a reasonable doubt that the firm of Williams, Shield, Snyder and Goas did business outside Pennsylvania and purchased goods outside of Pennsylvania,

that the payments by Mr. Warner to Mr. Leppo were made and were from money contributed by the partners from money they received from the firm and were made on behalf of the firm, thereby depleting the firm's assets or reducing its profits.

The term extortion means the obtaining of property from another person with his consent induced either by wrongful use of fear -- that is the one category -- or under color of official right.

Now, the term fear as used in the statute has the commonly, accepted meaning. It is a state of anxious concern, apprehension, alarm -- and when I say apprehension I mean apprehension of anticipated harm -- to a business or of a threatened loss.

I am going to read that to you again. The term extortion means the obtaining of property from another person with his consent induced either by wrongful use of fear or under color of official right. The term fear as used

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in the statute has the commonly accepted meaning. It is a state of anxious concern, alarm, apprehension of anticipated harm to a....

Office - Supreme Court, U.S.
FILED
OCT 5 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-19

In the Supreme Court of the United States

OCTOBER TERM, 1980

CARROLL LEPPO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the jury's finding that the requisite impact on interstate commerce under the Hobbs Act had been established.

2. Whether the prosecutor impermissibly commented on petitioner's right to remain silent.

3. Whether incriminating statements voluntarily made by petitioner during a polygraph examination were admissible at trial.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) and the opinion of the district court (Pet. App. 4a-19a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on March 26, 1981, and a petition for rehearing was denied on May 5, 1981. The petition for a writ of certiorari was filed on July 2, 1981. the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of extortion, in violation of 18 U.S.C. 1951. He was sentenced to imprisonment for one year, all but three

months of which was suspended, and he was placed on probation for two years. The court of appeals affirmed.

Petitioner was a County Commissioner for York County, Pennsylvania. In February 1976 he extorted $300 from an architectural firm to help pay for a Florida vacation. The firm had recently been awarded a $388,391 contract with the county to design a new prison. The $300 payment to petitioner was initially made from a personal account that the firm's business agent, Charles Warner, used to make political campaign contributions on behalf of the firm (II Tr. 24-29; see W. Tr. 9-12, 21)[1]. Warner was reimbursed by the partners of the firm with partnership profits. The architectural firm engaged in business in states other than Pennsylvania and purchased goods in interstate commerce (W. Tr. 4, 7-8).

ARGUMENT

1. The Hobbs Act prohibits extortion that interferes with interstate commerce "in any way or degree." 18 U.S.C. 1951(a). *Stirone* v. *United States*, 361 U.S. 212, 215 (1960). Petitioner contends (Pet. 11-18) that the proof of interference was insufficient here because his extortionate payment was derived from the after-tax profits of the architectural firm, which he alleges would not have been used for the business. His claim is without merit.

Congress intended the Hobbs Act to reach as broadly as the Commerce Clause permits. *United States* v. *Culbert*, 435 U.S. 371, 373 (1978); *Stirone* v. *United States*, *supra*. Thus, a minimal depletion of the resources of a business engaged in interstate commerce satisfies this jurisdictional element. *E.g.*, *United States* v. *Calder*, 641 F. 2d 76, 78 (2d Cir.), cert. denied, No. 80-6291 (Apr. 20, 1981); *United States* v. *French*, 628 F. 2d 1069, 1075, 1078 (8th Cir.), cert.

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[1] "W. Tr." refers to the transcript volume entitled "Excerpt Testimony of Charles S. Warner."

denied, No. 80-479 (Nov. 3, 1980); *United States* v. *Cerilli*, 603 F. 2d 415, 424 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Summers*, 598 F. 2d 450, 454 (5th Cir. 1979); *United States* v. *Craig*, 573 F. 2d 513, 518 (7th Cir.), cert. denied, 439 U.S. 820 (1978). Whether the payment is made from pre-tax or after-tax dollars is a matter of accounting, irrelevant to the question in this case. In either case the firm's assets are diminished by the amount of the payment. Thus, whether the payment results in less personal income for the partners or less reinvestment income for the firm does not affect application of the Hobbs Act. Payment of the money could have reduced the firm's ability to make interstate purchases; the fortuitous circumstance that the money was assertedly paid from a fund maintained by after-tax dollars does not modify that potential impact. See *United States* v. *Staszcuk*, 517 F. 2d 53 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975).

Furthermore, the target of petitioner's extortionate demand was the firm, and not Warner individually, or the individual partners of the firm. Refusal to succumb to petitioner's demand could have adversely affected the firm's future business with the county. Such a reduction in government contracts would again, in turn, decrease the firm's need for interstate products. See *Stirone* v. *United States, supra; United States* v. *Summers, supra*, 598 F. 2d at 454. Finally, the extortion had the effect of corrupting a business that conducted its affairs in several states. *United States* v. *French, supra*, 628 at 1078.[2] The evidence was more than sufficient to support the jury's verdict in this case.

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[2]Petitioner's reliance (Pet. 14-16) on *French* is misplaced. In *French* the court held that (628 F. 2d at 1078) if the extortion involves an interstate enterprise, like the architectural firm in the instant case, then interstate commerce is directly affected, "whether this effect is characterized as extraction of a wrongful tribute by a local official from an enterprise, or as an infusion of corrupt practices into an interstate

2. Petitioner contends (Pet. 19-23) that in closing argument the prosecutor impermissibly commented on his assertion of his Fifth Amendment right to remain silent. See *Griffin* v. *California*, 380 U.S. 609 (1965). When viewed in context, however, it is apparent that the prosecutor's remark was not an impermissible comment. Cf. *Lockett* v. *Ohio*, 438 U.S. 586, 594-595 (1978). During a polygraph examination conducted prior to trial, petitioner answered questions concerning an alleged extortionate payment of $500 received from the architectural firm in September 1975.[3] But when asked about the February payment of $300, he asserted his Fifth Amendment privilege. In his opening statement at trial, defense counsel inaccurately summarized petitioner's admissions during the polygraph examination, indicating that petitioner had acknowledged receipt of the February payment, but thought it was only improper and not illegal (I Tr. 27-28). When the evidence showed otherwise (see III Tr. 170, 174, 178), the prosecutor, in his closing argument, sought to correct any misimpression that the jury may have received.[4] The prosecutor explained that petitioner had not admitted the February payment during his conversation with the FBI agent; instead, petitioner (IV Tr. 80):

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enterprise whose activities reach across state lines." Actual proof of diminished interstate activity was deemed unnecessary. In the long passage quoted by petitioner (Pet. 14-16; 628 F. 2d at 1076-1077), the court considered a question that it ultimately chose not to resolve, and thus the passage was dictum. Similarly, petitioner's reliance on the language in *United States* v. *Staszcuk*, 502 F. 2d 875, 879 (1974), rev'd in pertinent part, 517 F. 2d 53 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975), is misplaced. Thus, neither *French* nor *Staszcuk* supports a contrary result in this case or requires review of the issue by this Court.

[3]Petitioner was acquitted on a count charging this payment as a violation of the Hobbs Act, 18 U.S.C. 1951.

[4]Thus, contrary to petitioner's assertion (Pet. 21-23), the prosecutor's comment was not based on any fact outside the record.

> * * * was talking about campaign money. He was talking about September. He never even said anything to [the agent] about February and his vacation.

The prosecutor's comment did not equate petitioner's silence with guilt, but rather clarified the extent of petitioner's admissions to the FBI agent. It was an entirely appropriate response to defense counsel's erroneous opening statement. See also *United States* v. *Blanton*, 531 F. 2d 442, 444 (10th Cir. 1975), cert. denied, 425 U.S. 935 (1976); *United States* v. *Isaacs*, 493 F. 2d 1124, 1164-1165 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *United States* v. *Littlepage*, 450 F. 2d 944, 945 (9th Cir. 1971).[5]

3. Petitioner argues (Pet. 23-24) that his voluntary statements concerning the September payment should not have been admitted at trial because the jury probably inferred from his willingness to speak about the September incident that he (Pet. 24) "failed to discuss the February incident out of a consciousness of guilt." There is no authority for the proposition that the government may only use a confession if it relates to all of the offenses charged. No evidence was introduced at trial that petitioner had refused to answer any questions concerning the February payment. Compare *Anderson* v. *Charles*, 447 U.S. 404 (1980), with *Doyle* v. *Ohio*, 426 U.S. 610 (1976). Consequently, the jury had no reason to assume, and no basis for inferring, that petitioner's failure to volunteer an explanation for the February incident was due to a consciousness of guilt.

Petitioner also argues (Pet. 23) that his admissions should not have been introduced because they were made during a polygraph examination, and therefore "the defense was precluded from fully cross examining the FBI agent

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[5]In addition, the court instructed the jury that no adverse inferences should be drawn from petitioner's failure to testify (J. Tr. 10). "J. Tr." refers to the transcript of the jury charge.

and from attempting to put the alleged statements in the proper context."[6] In fact, however, petitioner was fully able to question the agent about voluntariness, the length of the interrogation, any use of force, and whether petitioner's responses had been accurately recorded, without revealing that the confession was contemporaneously evaluated by a polygraph.[7] In any event, since these statements pertained solely to the count on which petitioner was acquitted, their admission could not have tainted his conviction for the February extortion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1981

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[6]The results of the polygraph examination were not introduced at trial.

[7]The district court conducted a lengthy pretrial voluntariness hearing to determine the admissibility of the statements.

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